7-03 MEE1 - Example 1

1. At issue are the requirements that must be complied with when a 95% shareholder merges a subsidiary into itself. Missouri provides for a “short form” merger whenever a corporate shareholder owns greater than 90% of the shares outstanding of another entity. The provisions under the short form merger simplify the merger process. Since Corp owns 95% of the outstanding stock of SUB, it is applicable here.

a) Approval of Board is not required for this merger.

When an entity is merged, the action constitutes a fundamental change in the corporation. Generally, such a transaction must be approved by the Board, who then present a resolution to the shareholders. However, in the case of a 90% (in our case 95) shareholder, such vote is merely a formality. Absent an agreement to the contrary, Corp could simply vote its shares to remove Pat and Dale, and replace w/Corp friendly directors. This is possible b/c shareholders can remove directors with or without cause. So, the approval of the Board is not a necessary requirement for this form of merger.

b) The requirement of shareholder vote by the shareholders of Corp depend largely upon the nature of Corp’s business. Directors are granted wide discretion to make decisions in the ordinary course of business. They may do so without any input from shareholders, much less their approval. The transaction must rise to the level of a fundamental change. If not, no vote is required.

Even if the merger constitutes a fundamental change to Corp., Pat and Dale cannot bring action unless they are shareholders. The Corp shareholders could bring action to enjoin the merger from Corp’s side if the actions are ultra vires. If the actions exceed authority, then ultra vires applies. However, the proper party are Corp s/h not Pat and Dale.

c) The vote of shareholders is not required in a short form merger as it would be a mere formality.

The general rule in a fundamental change is the a resolution is presented by the Board to the shareholders for a vote. Such vote must receive at least 2/3 of all outstanding shares. Since Corp has 95% of the shares, they could vote for the merger regardless of Pat and Dale.

2) When a minority shareholder or dissenter objects to a deal or disagree with a price offered, they are provided recourse through appraiser remedies.

Generally, a shareholder must 1) object to an action, 2) abstain or vote against and 3) demand appraisal.

In this case, Pat and Dan may demand appraisal rights since they are minority shareholders. This means that they will meet with the corporation and determine a fair price for the shares. If Pat, Dale and Corp can decide on a value, then any party may petition the Court who will appoint an expert.

Note: This appraisal action occurs apart from the merger, and applies only to the shares that Pat and Dale own. The transaction will not be hindered.

7-03 MEE1 - Example 2

1. The court should not unwind the merger for any of the reasons asserted by Pat & Dale. Generally, any fundamental change of a corporation requires a 2/3 approval by vote of the shareholders of a corporation. A fundamental change to a corporation includes a consolidation or a merger as is the case here. Therefore, under normal circumstances, the shareholders of the corp should vote on the merger as Pat and Dale assert as claim (b). However, that will not be a requirement here because of an exception called a short form merger. Also, generally, when two corporations merge or consolidate it requires a vote of the other corporation's shareholders (SUB) since the corporation is also experiencing a fundamental change as Pat and Dale assert as claim (c). However, the short form merger exception changes this result.

The short form merger is a simplified type of merger where a corporation does not have to receive a 2/3 approval by vote of shareholders if the corporation owns 90% or more of the corporation it is merging with. Here, Corp owns 95% of SUB; therefore, Corp does not require shareholder approval in order to facilitate the merger. This also eliminates the any need to acquire approval by Sub's board, which is not actually a requirement of this type of merger anyway because a short-form merger functions more like a takeover, although if a corporation already owns 90% of another corporation, the corp already has the ability to exercise significant control even without the merger.

As a result, this is a valid merger based on the facts presented and the court should not unwind the merger.

2. When a corporation has proposed a course of action that a minority of shareholders do not agree with, these shareholders have access to a remedy. Pat & Dale would be considered dissenting shareholders.

In order to be a dissenting shareholder and claim the remedies available, Pat & Dale must meet a few requirements. First, the shareholders must vote "no" on the appropriate measure. Here, Pat & Dale were not allowed to vote due to the type of merger going on, though the court would likely find they have equivocally voted no.

Second, the shareholders have to make it known that they are dissenting. This might include such things as making it known that they don't agree with the corporate action or some other such dissention. Here Pat & Dale have made it clear that they are not in favor of the merger.

Third, the shareholders have to request their shares be bought out by the corporation. A shareholder will receive FMV (fair market value) as of the date of the dissention - Here, Pat & Dale have in essence dissented and are entitled to FMV of their shares.

The question then becomes who determines FMV of the shares. The FMV is the price an independent purchaser would pay on the open market for the shares knowing all publicly available information about the corporation. If Pat & Dale are able to produce independent information as to FMV, which they were able to do here through the use of the independent financial advisor, they should be able to receive the higher FMV difference. This is done so that the majority shareholders are not able to force an action on minority shareholders and pay less than FMV for their shares.

Therefore, Pat & Dale have a legal basis for asserting a right to receive more than $20 per share offered by the Corp.

7-03 MEE1 - Example 3

1) No the court should not unwind the merger because Corp shareholders did not have to vote on the merger and Sub board of director approval was the equivalent of a shareholder vote.

Generally a shareholder vote is required when a fundamental organic change in the corporation is contemplated. This includes issuance of stock requiring a change in the article of incorporation, any substantive rather than procedural change in the articles and a sale of substantially all of the corporation assets or a dissolution to name the most common ones.

In the absence of a fundamental change a majority of the quorum of directors is needed to approve an action.

Here no changes in shareholder's right to Corp will be experienced neither would the articles need to be changed. The board of directors of Corp voted unanimously therefore quorum (usually 50% unless different in the articles of Incorp) was satisfied and the majority of the directors voted for business reason to approve of the merger. Additionally Pat & Dale standing is questionable because their injury is inexistent and they are not on the board of Corp.

However when it comes to Sub the board of directors properly voted against the Merger (one director one vote – full quorum and majority vote against) but because the merger would constitute a fundamental organic change for sub the vote must be submitted to the shareholder. Pat and Dale may argue that because there was no notice the shareholder vote did not occur but the reality is that shareholders can call for an immediate vote and presence at that vote constitute a waiver. In a shareholders vote, votes are tallied as 1 share 1 vote and Corp with 95% of the shares can force its will on the other shareholders.

In fact if the notice argument would be allowed to stand Corp with 95% of the votes could remove either Pat or Dale without cause and install their own directors in a new vote where even cumulative voting would not save either Pat or Dale.

2) By abstaining or voting against a shareholder issue and by filing in writing their disagreement Pat and Dale can recover the value of their share. In case the amount is in dispute the court will resolve the issue. However, in this case the offered amount at the merger is $24 per share and Pat and Dale claim $25. Since the two amounts are not too far apart (4%) and since the independent Advisor evaluates the amount to be between $21 and $26 it is doubtful that the Court will force the $25 price.

7-03 MEE3 - Example 1

Question 1

If Finance Company later finds the note, they can enforce it for $10,450.00.

At issue is a promissory note under Art. 3 of the Uniform Commercial Code. The note is a negotiable instrument under Art. 3: it is signed by Garden Shop, the maker, it is payable to order, it contains an unconditional promise to pay a fixed amount of money at a fixed time (90 days from issuance), and it contains no other obligation other than the obligation to pay. The amount is sufficiently fixed despite the discrepancy and the interest. A promise to pay interest does not affect the negotiability of a note. The discrepancy is governed by Art. 3's rules of construction: a written out word of numerical value trumps a conflicting number.

As the original payee to whom the note was issued, Finance Co. is entitled to enforce the note for $10,450.00.

Question 2

Garden Shop's obligation would not be discharged against all persons.

Payment of an instrument to someone other than a person entitled to enforce it does not discharge the obligation to pay a person entitled to enforce. If a person entitled to enforce comes to Garden Shop's door, they are liable to them for the payment of the note.

As a practical matter, Garden Shop would be in trouble only if Finance Company indorsed the note. Indorsement would be necessary for Finance Company to negotiate order paper (or to transform it into bearer paper). Financial Company could voluntarily transfer it without indorsement, but the transferee would be subject to Garden Shop's defense (of payment) against Finance. But, if Finance indorsed it, and eventually a holder of a note paid value, took in good faith & without notice of claims & defenses) – a Holder in due course – Garden Shop would have to pay the holder in due course, despite the fact that they have already paid Finance.

Question Three

The general rule is that in order to enforce an instrument, a party must bring the instrument into court and demonstrate that they are a person entitled to enforce. However, Finance Co. would fall under the exception: A person entitled to enforce who is not in possession of the instrument may enforce it by coming into court and demonstrating why they don't have it (i.e., it was lost, stolen, etc.) The court will order Garden Shop to pay Finance. However, the court may order Finance to protect Garden Shop if a person entitled to enforce with possession comes, such as requiring Finance to put up a bond to indemnify Garden Shop.

7-03 MEE3 - Example 2

(1) Finance Co. can enforce the note for $10,450. In writings on notes, words take precedence over numbers. Therefore, the written word "Ten thousand four hundred fifty" is considered clearer than $10,000. Furthermore, the writing is supposed to be for $10,450. The parties had made a mutual mistake and this cannot be asserted against Finance Co. The writing should be returned and the error should be corrected.

(2) Garden Shop's obligation would not be discharged against a holder in due course. Whether or not there can be a holder in due course depends whether or not Finance Co. signed the note.

If finance Co. signed the note in blank, they converted order paper to bearer paper. Bearer paper can be negotiated to anyone simply by passing possession. Therefore anyone who is in possession of bearer paper would be a holder. To qualify as a holder in due course, the holder must (1) take in good faith (2) for value and (3) without any knowledge of claims or defenses. Therefore, the original holder is a thief and wouldn't qualify as a holder in due course but if they transferred to someone without knowledge then holder in due course status is possible.

Garden Shop would not be protected against claims by holders in due course.

(3) Finance Co. must be able to prove that it was a person entitled to enforce and that they had possession but do not currently because the note was lost, stolen, or inadvertently destroyed. The court may require Finance Co. to post security and defend against later claims or indemnify Garden Shop.

7-03 MEE3 - Example 3

1. Yes, if Finance Co. later finds the note, it will be allowed to enforce it in the amount of $10,450.00.

A holder who is the original payee on a note, is entitled to enforce the note subject to any claims or defenses on the underlying transaction. Generally, the original payee becomes entitled to enforce the note if it has possession of the note. In addition, when determining the amount due on a note, words trump numbers if there is an inconsistency.

In this case, Finance Co. was the original payee on the note and it became entitled to enforce the note when it was first issued to them by Garden Shop. As long as Finance Co. has possession of the note, it is a person entitled to enforce. Furthermore, because the words on the note say $10,450.00 and the numbers say $10,000, the words trump the numbers, and Finance Co. will be entitled to enforce for $10,450.00.

Therefore, Finance Co. can enforce the note, and can do so for $10,450.00.

2. Garden Shop's liability would be discharged as to some persons, but not necessarily all persons.

When a maker of a note pays a person entitled to enforce the note, it discharges the maker's liability on that note. However, payment to an improper party would not discharge maker's liability.

In this case, the note was order paper because it was payable "to the order of Finance Co." If Finance Co. merely lost the note or it was inadvertently destroyed, then Garden Shop's liability is discharged when it pays Finance Co. Similarly, if a thief stole the note and indorsed it with Finance Co's name, any subsequent transferee, or thief himself, would not be entitled to enforce, and thus Garden Shop's liability would be discharged. If, on the other hand, Finance Co. properly indorsed the note and transferred it or negotiated it to another party, Finance Co. would no longer be entitled to enforce the note. Thus, Garden Shop's payment to Finance Co. would not discharge its liability on the note.

3. Finance Co. could still collect from Garden Shop even if it cannot produce the note.

Generally, to be a person entitled to enforce a note has possession of the note. There are some exceptions. A person may still be entitled to enforce the note if it was lost, stolen or inadvertently destroyed.

In this case, Finance Co. would have to prove that it did not purposely destroy the note to be able to collect on it, or it would somehow have to show that the note was lost or stolen. Finance Co. would probably also have to show that it did not transfer or negotiate the note, and that it did not indorse the note. If it indorsed the note, even a thief could enforce it since it was order paper. Since a court would not want to expose Garden Shop to multiple liability on the note, Finance Co. would have to be able to show that nobody else could be entitled to enforce it.

7-03 MEE4 - Example 1

Question 1

The trial court was correct in denying the motion for abstention.

Abstention is a prudential doctrine that federal courts utilize to minimize the friction between federal and state courts. Abstention is appropriate in cases where a state claim might make federal court adjudication of a constitutional issue unnecessary, or when the federal court is ruling on an undecided issue of state law and there is a danger that the federal court might get the wrong outcome. Neither of these dangers are present here, indeed, nothing would prevent Farmer from succeeding on both state law warranty claims and the federal statute (assuming res judicata or claim preclusion would not bar his claim, which it would not if the federal statute was enacted after the state law claim was filed.) Therefore, the federal court correctly declined to dismiss on abstention grounds.

Question 2

The court correctly ruled against certification.

Under Federal Rule of Civil Procedure 23, class action plaintiff must meet several prerequisites. First, there must be a commonality of issues throughout the class. Here, the class's claims all relate to one defective part marketed by Truck Co. The same federal statute will apply to this breach of warranty claim. Second, the plaintiff must show Adequacy, both of the named representative - Farmer - and counsel. Farmer appears to be a sufficient named plaintiff, in that he has class action experience. There is an issue whether he would adequately represent the class members with significantly more damages (discussed more below under typicality). Additionally, the named counsel might not be adequate to handle class action litigation. This is a judgment call for the court, and might depend on counsel's willingness to bring in additional counsel or staff to ease the burden of a suit this burdensome and ensure adequate representation. Courts have gone either way on this, but neither counsel nor Farmer is probably adequate here. Third, you need Numerosity. Numerosity generally means a big enough class that joinder is inappropriate. Generally, more than 10 is sufficient, so 100,000 class is surely sufficient. Finally, one needs Typicality, which means that Farmer's claims a typical of the class. This is where the class will fail, because the claims of the class are too diverse, ranging from the cost of replacing shock absorbers to serious personal injuries. Farmer will likely argue that the claim is typical, it is just the damages that differ (and there could be separate trials for that). However, that claim would fail because there might be complicated issues of causation and negligence in the personal injury actions.

Additionally, a class action plaintiff must show that (1) they are seeking injunctive relief only - inapplicable because Farmer is seeking damages (2) there is a danger of inconsistent judgements or (3) the class action is a superior method of adjudication in the case because common issues predominate. For the reasons discussed above, the claims are individualized and a class action would not be appropriate.

7-03 MEE4 - Example 2

1. The court's ruling on the motion regarding abstention probably was correct. At issue is when a federal court should abstain from hearing a case because of action currently pending in a state court.

Generally, a federal court will exercise the doctrine of abstention when it is either asked to rule on the constitutionality of a state law that has not yet been interpreted by a State's Supreme Court, and that court could interpret it in such a way so as to avoid the constitutional issue, or when a federal courts ruling may interfere substantially with a state regulatory agency and the agency's ability to carry out its functions. In these cases the court will generally force the litigants to seek relief in state court They do not dismiss the action from the federal courts, they usually stay the action.

Neither of the above stated cases are applicable to these facts. There is neither any state law that is in issue nor any state regulatory agency that might be interfered with.

Further, there are other compelling reasons for the court not to abstain. There is no indication on these facts that the state court proceeding is more appropriate to hear this type of case. Further, each proceeding is premised in different law, and if anything the new federal law should predominate over conflicting state law. For all these reasons, the federal court should not have abstained and thus their ruling in this matter was correct.

2. The courts ruling denying class certification was also likely appropriate in this case. At issue is whether Farmer and his lawyer can sufficiently meet the requirements of class certification.

In order for a class action to be certified, the proponent must prove four elements: Commonality, Adequacy, Typicality, and Numerosity. Commonality means that the claims between all of the class members are similar and involve similar issues. Adequacy involves the ability of the class representative to represent the class both based on their claims and their representation. Numerosity means that there must be a very large number of people that belong to the class. Typicality means that the claims of the class representative must by typical of the claims of the class as a whole.

Further, since Farmer is seeking money damages, he must show two additional elements; Superiority and Predominance. Predominance means that the claims of a majority of class members generally predominate over individual issues. Superiority requires a showing that the class action is a superior way to handle the issue rather than individual complaints.

In this case, Farmer has failed to show several of these elements. The only one that may be adequately met here is numerosity, because 100,000 individuals may be subject to the class. However, while all of the injuries come from a common problem, the shock absorbers, it is not clear that all their injuries are common as many people have suffered a very wide variety of different personal injuries. Further, Farmer is not necessarily typical of the class because he has only suffered $250 in damages while many others have been seriously injured. Also, his lawyer is likely inadequate because he is only a recent member of the bar with no experience handling class actions. Further, while it may be argued that the class action is superior because of the very large number of harmed individuals, it is unlikely that the common issues predominate because many people have suffered very serious personal injuries due to the shock absorbers.

Thus, for all these reasons, the ruling likely was appropriate.

7-03 MEE4 - Example 3

1. The court was correct in denying Truckco's motion to abstain. Initially, there is nothing improper about litigation pending in both state and federal court concerning the same subject matter. Whichever case concludes first will probably have res judicata effect and may therefore make the case pending in the other court moot, but there is nothing improper merely because similar actions are pending in two different courts. Thus, federal courts will generally abstain only for two reasons – 1) When there is an action pending before the state court which involves a question that could be decided so as to avoid a constitutional issue and 2) When the federal court does not wish to unduly disrupt a state's administrative regulation. Neither of those issues is present here, and the court was correct in choosing not to abstain.

2. The court was also correct in denying class certification. Under the Federal Rules of Civil Procedure (I think it's Rule 56), class certification is proper where

1) It would be impracticable to join all of the plaintiffs in a single proceeding
2) There are common questions of law and fact
3) The named plaintiff's claim is typical of the class, and
4) Whether the named plaintiff will adequately represent the class.

In addition to the first four factors, the court must <u>also</u> find one of the following

a) Common questions of law and fact predominance and a class action is the superior means of adjudication.
b) The defendant has acted or refused to act with regard to all members of the class and declaration or injunctive relief is appropriate <u>or</u>
c) Failure to join all claims will result in inconsistent liabilities or prejudice the ability of unjoined plaintiffs to protect their interests.

Given this test, it is apparent that class certification is not proper in this case. There are enough plaintiffs that joinder of all of them would be impracticable (100,000 people have suffered losses). There are also probably many questions of law or fact that would be common among the plaintiffs (all allegedly suffered harm from the same defendant's vehicles). However, it does not appear that Farmer's claims are typical of the class (he or she only suffered minor property damage while other claimants suffered substantial personal injures) and there is reason to think that Farmer may not adequately represent the class, given that Farmer is represented by a new attorney who has no class litigation experience but is now handling two (although the mere fact that the attorney is new is not enough). Thus, Farmer cannot satisfy the first four factors and class action certification should have been denied. Even if Farmer could have satisfied the first four factors, Farmer would still have to show declaratory or injunctive relief was appropriate (almost surely not) or that common questions of law and fact predominate (more promising, but given the range of injuries, they might not) or that there could be inconsistent liability or prejudice to unjoined parties (this is the most likely of the three, as 100,000 different lawsuits could produce myriad results). In any case, because Farmer did not meet the standard, the class was properly denied certification.

7-03 MEE5 - Example 1

Question 1

Yes, the partnership is bound by Carl's contract. At issue is partners liability for the action of another partner.

First, it is important to note that Adam, Barbara, and Carl were partners. The lack of a written partnership agreement does not matter, all that matters is that the partners intend to carry on as co-owners in a business for profit. As partners, they are all principals and agents vis-a-vis each other. Therefore, the rules of agency apply.

As agent for the partnership, Carl binds the partnership if there was (i) actual, (ii) apparent, or (iii) ratified authority.

Actual authority focuses on relationship between the principal & agent. Normally, partners have actual authority to make contracts in the partnership's ordinary course of business. However, here, Carl's actual authority was restrained by Adam & Barbara's limiting instructions. Therefore, there was no actual authority.

However, there was apparent authority here. Apparent authority focuses not on the relationship between the principal & the agent, but the relationship between the principal & the 3rd party – here, Jane. Because this contract was not in the ordinary course of partnership business, this is a close call. However, apparent authority is created by (1) Adam & Barbara's holding out of Carl, cloaked in partnership authority, and (2) Jane's reasonable reliance on that. Because Adam & Barbara dispatched Carl to research and talk to Jane, they cloaked him with partnership authority. This was compounded by the fact that Adam & Barbara knew Jane had only dealt with Carl, and that in those transactions Carl made contracts that bound the partnership. Given this history, Jane's reliance on Carl's authority was reasonable, and the partnership is bound by Carl's contract. (Because they are bound by apparent authority, a discussion of ratified authority is unnecessary)

Question 2

Yes, the partnership may recover.

The normal rule of partnership losses is that losses are shared as profits are shared. Absent an agreement to the contrary, profits are shared equally. This means losses are shared equally.

However, as mentioned above, partners are in an agency relationship, meaning all fiduciary duties that run from agent to principal apply: the duty of care, duty of loyalty, duty to account, duty of obedience, and duty not to compete are all applicable. Carl breached duty of loyalty & the duty of obedience. The duty of obedience is the agent's duty to follow the reasonable instructions of the principal. Here, by making a contract with Jane, Carl breached this duty.

The normal measure of damages for breach of a fiduciary duty is actual damages. Adam & Barbara can recover these from Carl.

7-03 MEE5 - Example 2

(1) The partnership is bound by the contract Carl signed. At issue is the liability of a partnership on contracts signed by partners without expressed authority.

All partners are both fiduciaries and agents vis a vis the partnership. Therefore, the partnership will be bound by all contracts entered into by a partner on behalf of the partnership if the partner possessed the authority to contract.

The first type of authority is actual authority which is the authority an agent assumes he has based on his dealings with the principal or implied by some usage of trade. Here, Carl lacked actual authority because Adam and Barbara instructed him not to finalize a deal with Jane without first discussing the terms with them.

The second type of authority an agent may possess is apparent authority. Apparent authority arises out of the principal's representations to a third party that give the agent the appearance of authority. In other words, the principal cloaks the agent with the appearance and a third party relies on this appearance to their detriment. In this case, it is debatable whether Carl possessed apparent authority. Carl was the only partner Jane had ever dealt with and was accustomed to negotiating contracts with Carl. Thus an argument can be made Carl possessed apparent authority. However, an agent in the position of someone such as Carl, is usually only presumed to have authority to negotiate contracts in the normal partnership business. Here the normal partnership business is beverage distribution and not purchasing pin ball machines. Although the partnership was contemplating expansion, Adam and Barbara could argue that since the contract involved something other than beverage distribution Jane should have been on notice that Carl lacked authority to negotiate the contract alone.

It is a close call, but more than likely a court will find that Carl had apparent authority. However, regardless of whether Carl had apparent authority, it appears that the partnership ratified the contract and would be bound whether or not Carl possessed authority. A partnership may expressly ratify a contract or impliedly by accepting its benefits. In this case, it appears that Adam and Barbara did not immediately reject the contract with Jane upon discovering it. Rather the facts state that they objected only later when they discovered the revenue generated by the machines was insufficient. Therefore, the partnership ratified the contract and is bound by it.

(2) The partnership may recover damages from Carl because he breached his fiduciary duties to the partnership. As an agent of the partnership, Carl owed a duty of loyalty and a duty to obey reasonable instructions. Carl directly disobeyed Adam and Barbara's instruction that he not execute a contract with Jane without first consulting them. Therefore, Adam and Barbara may seek to recover losses on the contract from Carl.

Note that Carl may have a defense against Adam and Barbara if the court finds that the partnership ratified the contract and accepted its benefits. Having accepted the benefits of the contract, Carl might argue that Adam and Barbara should now be estopped from trying to deny the contract and collect damages after it has proven to be unprofitable.

7-03 MEE5 - Example 3

1. The partnership is bound by the contract Carl signed. Each partner is both a principal and an agent of the other partners. An agent can bind the principal if the agent is acting with authority. Authority may be actual or apparent; as an agents actions may later be ratified by a principal. Here, Carl does not have actual authority to enter into the contract with Jane. He does have apparent authority.

Apparent authority arises where a principal “holds out” an agent as having actual authority when, in fact, the agent does not have actual authority. Apparent authority focuses on the reasonable beliefs of a third party, in this case Jane. Carl had apparent authority to sign the contract with Jane because he had dealt exclusively with her in the past on behalf of the partnership. Although he had not dealt with her regarding video games before, the facts indicate that several beverage distributors are acquiring such games and Jane’s reliance would be reasonable. The partnership is bound by the contract because Carl had apparent authority to enter into the contract with Jane.

2. Yes, the partnership can recover any loss from Carl. When an agent acts contrary to the principal’s instructions, he breaches a duty to obey and a duty of care. The principal can hold the agent liable for any losses resulting from such a breach. In this case Carl breached his duty to obey A and B’s reasonable orders by entering into a contract without first discussing the terms with A and B. Carl also breached a duty of care in paying an unreasonable price for the machines. Although the facts are not very clear, they do indicate that the price was not “justified”. It appears that, rather than visit all 72 bars, Carl may have generalized facts about the 90 machines in 50 bars that he did see. Moreover, the facts indicate that Carl relied on Jane’s representations regarding revenue and expenses.

An agent is required to act as a reasonably prudent person would in order to comply with the duty of care. In this case, Carl breached the duty of care by failing to conduct an appropriate investigation. The breach resulted in a loss to ABC that can be recovered from Carl.

7-03 MEE 6 - Example 1

1. The court should rule that the premarital agreement provisions regarding property division are valid but the provisions regarding child support are invalid unless the court finds the provisions not severable in which case the entire agreement is void.

In order to have a valid antenuptual (premarital) agreement it must be in writing, signed by both spouses, any spouse waiving any rights must understand the nature and legal consequences of the rights being waived, there must be a full and fair disclosure of all relevant assets, it must be fair, and it must be supported by consideration.
In this case the agreement was in writing, signed by both spouses, was supported by consideration (they both waived certain rights), Ann conceded that it was fair, and there are no facts indicating any lack of disclosure. Thus, the only element at issue is whether Ann understood the nature and legal consequences of the rights she waived. While she was not represented by an attorney, that alone is not reason to void the agreement. Furthermore, she was advised by Lawyer of what she would waive by signing, that he represented only Burt, and that she retain an attorney. Ann had a right to enter into the agreement without the advice of her own lawyer and did so. Therefore, the property division provisions are valid.

Regarding the waiver of child support, both parents are responsible to support a child regardless of their marital status. Child support is for the benefit of the child, not the custodial parent. A premarital agreement provision waiving child support is invalid because no one can waive the child's right to receive support from a parent. Children are entitled to the standard of living they would have had if the marriage remained intact. This would be frustrated by allowing a premarital agreement to relieve a parent of this responsibility, therefore, the child support provisions in the agreement between Ann and Burt are invalid.

The fact the the waiver of child support is invalid may be used to argue that the entire agreement is therefore invalid because the provisions are not severable. A severability clause (stating that if a clause in the agreement is void, the agreement is severable and other clauses shall remain in full force and effect) in the agreement would be relevant to this issue. Also relevant would be if the waiver of child support was taken into account in agreeing to the property division or was entirely separate.

2. The court should rule that the trust fund is mostly Ann's separate property but that any interest/income on the principal earned during the marriage is marital property (if the premarital agreement is invalid).

Upon a divorce in Missouri, property is classified as marital or separate. All property acquired during the marriage is presumed to be marital property. Property acquired 1) before marriage, 2) after legal separation, or 3) by gift, bequest, or inheritance to one spouse is considered separate property. A court must divide marital property. The standard is a just (not equal) division. A court may not divide separate property. The principal of an asset acquired before marriage and any increase in value due to economic factors (i.e. inflation) is separate property. Any interest or income earned from the asset during the marriage is treated like normal income and is marital property. In this case, Ann aquired the trust fund before she married, so the principal of $200M is Ann's separate property. To the extent that the remaining $600M in value was generated by economic factors, it is also Ann's separate property. To the exent that any of the current value is comprised of trust income that was reinvested into the trust, that portion is marital property and subject to division.

Regarding the premarital agreement's effect on the division of the trust fund, if the premarital agreement is valid, Burt would have no right to any portion of the trust fund because Ann is the beneficiary. Burt could argue that the agreement could could be construed such that it does not apply to the trust fund because the trust assets are not "titled soley in her name" as the trustee holds legal title. Because of Ann's equitable title as a beneficiary and the likely intent of the premarital agreement, a court would be unlikely to agree with this argument.

If the premarital agreement is invalid, then the interest/income of the trust would be marital property and subject to division as described above.

7-03 MEE6 - Example 2

1. The premarital agreement between Burt and Ann will be found to be valid as to the waiver of marital property rights, but invalid as to the waiver of child support.

As to property rights waivers, parties may change the classification by agreement. The agreement will be enforced if it was (1) Written; (2) Consented to after a full and fair disclosure of each party's assets and (3) is a fair agreement. With regard to property rights, the Missouri court will judge said rights as of the time the agreement was made. Ann concedes that the property agreement was substantively fair, so this is not an issue. Her only claim, that the agreement should be invalidated because she did not consult her own attorney will not invalidate the property portion of the agreement. Ann was advised that she may want to get the advice of separate legal counsel, but she denied, with full knowledge of her options. She was still given a fair and full disclosure of both parties assets and consented voluntarily; her lack of separate legal counsel will not invalidate the property agreement under this situation.

As to the waiver of child support, however, that section of the premarital agreement will not be upheld. Both parents have an obligation to support their children. This is not a right that may be waived by the parties. The court is not bound by pre-marital agreements regarding the care of the children and may still order child support to be paid to the custodial parent when the court considers (1) The economic situation of both parents; (2) The custody arrangements for the children, (3) the standard of living the child would have enjoyed had the couple remained married and other factors considering the best interest of the child.

The court may enforce the property distribution agreement in the pre-marital agreement while refusing to enforce the child support provisions.

(*It should also be noted that here, the agreement does not waive spousal support and the court may require such support if the wife cannot reasonably support herself).

2. Regardless of the pre-marital agreement, the principle of the trust fund would not be considered marital property subject to division, however the increase in the value of the trust fund would be an issue if the premarital agreement does not govern. An issue most likely resolved in favor of Ann.

If the premarital agreement does not govern and make wife's income in the increase in the value of the trust fund separate property, the court would have to classify the increase in value as separate or marital property.

Increase in the value of investments are classified according to the reason for the increase. Increases due solely to economic increases in value are still separate property, whereas increases in value due to marital contributions are considered marital property. Marital contributions include work/labor as well as income/money contributions. If Ann had managed the trust fund herself, the income attributable to her management/work would be considered marital property. However, since her father managed the trust fund with no contribution from Ann, the increase in value would remain Anne's separate property, regardless of the premarital agreement.

7-03 MEE6 - Example 3

1. For a premarital agreement to be valid the parties must have been fully informed of their legal rights, there must have been full disclosure of each parties financial assets, the agreement must be fair and must be the result of fair consideration. If the agreement meets these requirements it will be valid as to property distribution and waiver of intestacy rights. However no provisions regarding child custody and care/support are binding upon the court.

It appears from the facts given there was not any omissions or misrepresentations as to the financial assets of the parties, <u>each</u> party waived waived their rights to separate and marital property titled solely in the name of the other so there was likely consideration and the agreement was fair as to the property distribution but as already noted the parents can not waive the child's right to support.

The only remaining issue is whether the absence of independent legal counsel for Anne precluded her from being fully informed of her rights. Though more investigation may be needed to determine if Anne was given adequate counsel on what property rights she had and was waiving the absence of legal counsel for Anne does not make the agreement per se unfair. Thus, if the court determines that Anne was informed of her legal rights the court should enforce the agreement as to the property distribution but not as to the child support provisions.

2. Property received prior to a marriage is separate property as a general rule and is not subject to distribute. In the present case the facts indicate that Anne received the trust fund worth $200,000 prior to the marriage. Thus the original 200,000 of the trust fund is Anne's separate property and is not subject to distribution regardless of the validity of the trust fund. However at the time of divorce the facts indicate that the trust fund is worth $800,000. Income earned from separate property during the marriage can be marital property if it is the result of marital labor or something other than shear economic appreciation such as inflation.

Here the trust fund was managed by Anne's father the whole time so it does not appear that the increase was due to marital labor. More information would be needed to determine if the increase was due to gift or inheritance contribution (which would be separate prop of Anne) marital contribution (which would be marital prop) reinvestment of dividends earned during the marriage (which would be marital) or shear inflation.

If the premarital agreement is deemed invalid or the agreement is deemed valid but the trust was retitled in both Anne & Burt's names during the trust then Anne would bear the burden of tracing and identifying all the additional $700,000 as marital or separate property. If Anne can identify all the money as the product separate prop or if the premarital agreement is valid and Anne is the sole name on the fund then the court should find that the trust fund is separate property not subject to distribution.

7-03 MEE 7 - Example 1

The issue is what are the debtors rights, remedies and liabilities in the property. Debtor had the right to redeem the property and because this was denied, he has the right to damages based on the creditors actions less his liabilities which is the remaining money due on his note.

This is a secured transaction which is governed by article 9 of the UCC. Generally, to determine what rights the debtor and creditor have against each other requires a discussion of whether a security interest has attached to the goods and whether there has been a default which triggers the creditors right of possession.

To attach a security interest the the following are required: 1) debtor must sign a security agreement; 2) the creditor must pay value; and 3) the debtor must have rights in the collateral. The security agreement must be a signed, authenticated record containing an indication of the parties and a sufficient description of the collateral.

Here, the facts show that Debtor signed a security agreement. The creditor also paid value because he gave Debtor $20,000 inexchange for a security interest in the items bought. Finally, the debtor got rights in the collateral because he was able to use the "equipment" in his business. Thus, a valid security interest attached to the items.

There is a problem with one of the clauses in the security agreement. A creditor is NOT allowed to make the debtor waive his "equitable right of redemption" in the collateral. This right means that upon default, the debtor is allowed to "redeem" or get his collateral back by paying the creditor the full amount owed on the obligation plus any costs of repossession. The creditor must accept that amount if a commercially reasonable sale has not yet occurred. Any attempt to make the debtor waive this right is not valid.

Once a security agreement has attached, the next issue is what are the creditors rights in the collateral. Upon "default", a creditor may "repossess" the collateral (take it from the debtor) so long as he does not "breach the peace" in the process. A breach of the peace occurrs where the debtor is physically present when the creditor tries to take the property and the debtor objects to the taking. If there is any chance of a serious risk of violence, the creditor has breached the peace. The remedy for breach of the peace is a return of the collateral or damages for wrongful sale.

Here, Debtor may argue that Bank breached the peace when it repossessed the collateral. he may argue that because Bank came to do the reposession late at night and because the debtors employee made strong objections to its taking, he took the property wrongfully. Bank will argue that since Debtor was not physically present to object, there was no breach of the peace. A court will find that Bank did breach the peace during the repo. because employee was an agent of the Debtor and his objections were sufficient to require the Bank to come back at a later time or try when there was no objection from anyone. A court will find that this activity constituted a possibility of violence because the employee "objected loudly" and stated that "he did think he should let the Bank in." Banks intrusion despite this statement was a breach of the peace.

The next issue is what rights the debtor has in the property. Despite the waiver clause, Debtor had the rights to pay the Bank what was owed on the obligation before Bank sold the property. If that amount was paid, Bank had to give the collateral back. While it was not enough for Debtor to offer Bank the "arrearage" amount, Debtor did assert his "equitable" right of "redemption" when he offered to pay back the full amount of the debt plus repossession costs. Banks failure to take Debtors payment and give the collateral back constituted a breach of his obligations.

The Debtor is entitled to a return of the collateral. But, since this collateral has already been sold, the debtor has the rights to any damages suffered as a result of the Banks wrongful conduct. Here, Debtor is liable for the full amount of the note, minus any money Bank got in the sale. He will not be liable for the deficiency of $4,000 because Banks actions were wrongful. Debtor should also be entitled to any damages as a result of having to close the kitchen because Bank was responsible for that.

7-03 MEE7 - Example 2

Debtor has the right to seek damages against Bank based on two major grounds: the fact that Bank's repossession was wrongful and the fact that Bank refused to allow Debtor to properly redeem.

In this case, Bank had a valid security interest in the kitchen equipment. Bank loaned Debtor $20,000 to purchase kitchen equipment and took a security interest in the equipment actually purchased by Debtor. This arrangement was evidenced by an agreement signed by the Debtor, and the Debtor took rights in the collateral. Thus, the interest attached. Further, this purchase money security interest was perfected, and if this perfection occurred within 20 days of Debtor taking the collateral, it would have priority over other security interests in the collateral. However, as the question doesn't indicate any other security interests, attachment was all that was necessary to trigger Bank's rights in this case.

The agreement also had a valid acceleration clause that made the entire obligation due upon failure to miss any payment. One issue that arises under these facts is whether Bank waived their obligation to use the acceleration clause when they did not exercise this right after the first, second, or third payment missed. Unless Debtor can show that Bank acted in bad faith, Bank probably did not waive this right. If anything, Bank gave Debtor every opportunity to catch up on payments and avoid acceleration. Thus, Bank was likely not in violation of the agreement when they decided to repossess the collateral.

A secured party's rights in collateral are triggered upon default. Here, Debtor defaulted in his payments to Bank, so they did have a right to repossess the collateral. However, their repossession in this case was likely wrongful. A second party can only engage in self-help repossession if there is no chance of a "breach of the peace." A breach of the peace occurs whenever there is a threat of violence. In cases such as this it occurs when the debtor is physically present at the repossession and verbally objects. Here, the debtor was not actually present when Bank attempted the self-help repossession. However, his employee was there and specifically asked the men to wait for Debtor, and then verbally objected loudly when the repossession occurred. It is likely that a court would find this as a breach of the peace, making the repossession improper under U.C.C. Article 9. Thus, Debtor would have the remedy to sue for any damages he suffered due to the removal of the equipment.

Further, Bank wrongfully refused to allow Debtor to try to redeem his property before sale. While there a waiver of Debtor's redemption rights in the original contract, it is likely that this clause is unenforceable. A debtor's right to redemption is essentially absolute and cannot be waived in a security agreement. The only way a court may allow a waiver of a right like this is if the waiver occurred after the property was repossessed. Thus, the waiver here was ineffective.

Further, Debtor tried to appropriately redeem in this case and was denied. The right of redemption allows a debtor to reclaim his collateral up until the moment of sale by offering to pay the full debt plus any expenses related to the repossession and the sale. Debtor offered to do this, but Bank wrongfully denied him the opportunity.

The court may take different approaches to the remedy. Debtor can likely sue Bank for the breach and claim any damages that are reasonably related to the taking of the equipment, which may be substantial here because Debtor was forced to close his restaurant. The court may also presume that the value of the collateral was equal to the value of the debt, and not allow the Bank to recover any deficiency.

Should the court allow Debtor to go after Bank for damages, Debtor may still be liable on the deficiency owed to Bank. When a party takes interest in collateral to secure a loan, and at a commercially reasonable sale they do not get enough money to cover the loan, they may still get a deficiency judgment against the debtor. In this case, since the collateral did not cover the value of the loan, Debtor may be liable to Bank on the deficiency. As discussed above, however, Bank's wrongful conduct may preclude them from receiving the deficiency.

7-03 MEE7 - Example 3

Debtor has several rights and remedies.

First Article 9 does apply because Bank had a properly perfected security interest in Debtor's equipment through creation & attachment. He filed to gain perfection, although that is irrelevant to the situation at hand because there is no priority fight.

When debtor missed four monthly installments, Bank had the right to repossess the equipment pursuant to the terms of the agreement through self-help. However, the manner in which the Bank went about its repossession violated Article 9 by constituting a breach of the peace. A secured party has a right to repossess collateral but cannot breach the peace in doing so. Bank's conduct constituted a breach of the peace because Bank had its employees come to restaurant at night, knock loudly on the door and come to get the equipment. The employee of Debtor stated that he did not want the Bank employees to come in "objecting loudly" and they walked right past him. In looking at the totality of these circumstances, including the time of the day and the resistance, although only slight, of the restaurant employee, the Bank breached the peace because this type of intimidating entry could have caused a fight and was inappropriate under the circumstances. The Bank should have asked the sheriff to repossess the property through a replevin action, or it should have acted more reasonably in its own self help remedy.

The Bank is able to have an acceleration clause if Debtor has failed to make several payments in a row. Therefore this clause is not unlawful under Article 9. However, the Debtor is entitled to redeem the property at any time before the sale of the property. This is why as part of the Safe Harbor Rule for commercial reasonableness of the sale, the secured party is required to provide the name and phone number of a party the Debtor can call to redeem the property. In this case when Debtor told Bank he could pay the full debt prior to the property being sold, he should have been entitled to do so.

Therefore, under Article 9, Debtor can recover for a breach of the peace and he should not have to pay the deficiency because he should have been allowed to redeem the property for payment of the full debt prior to the commercially reasonable sale. Debtor may also be entitled to damages because as a result of all of Bank's activities he had to close his kitchen.